30905

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 423.

THE UNITED STATES AND THE KIOWA AND COMANCHE INDIANS, APPELLANTS,

vs.

THOMAS C. ANDREWS.

APPEAL FROM THE COURT OF CLAIMS.

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1 In the Court of Claims.

THOMAS C. ANDREWS, *vs.* THE UNITED STATES AND THE KIOWA AND COMANCHE INDIANS.	No. 7836, Indian Depredation.

I. *Petition.—Filed July 23, 1892.*

To the Honorable the Court of Claims:

The claimant, who is now a resident of Tarrant County, State of Texas, respectfully represents:

First. That the following described property, then belonging to him, was taken from his possession without his consent, by Indians of a tribe or nation then in amity with the United States, without just cause or provocation on the part of the claimant or any of his agents, and the same has never been returned or paid for, to wit:

335 beef steers, of the value of $20 each	$6,700.00
15 saddle horses, of the value of $75 each	1,125.00
14 saddle horses, of the value of $100 each	1,400.00
Total	$9,225.00

Second. That said property was taken as aforesaid by a band, tribe, or nation of Indians known as the Kiowa and Comanches on or about the middle of June, 1876, or 1877, in the Indian Territory, near the Ouchita River.

Third. No claim for said losses has heretofore been presented for examination and payment to any Department of the Government.

Fourth. Claimant alleges that he is entitled to relief and payment of his claim under act of Congress of March 3, 1891, entitled "An act to provide for the adjudication and payment of claims arising from Indian depredations," and the acts therein referred to.

Fifth. Claimant alleges that he is now the sole owner of said claim; that he is justly entitled to the amount herein claimed from the United States, after allowing all just claims and offsets; that he is a citizen of the United States, and he believes the facts stated in this petition to be true.

Your petitioner therefore prays judgment upon the facts and the law, in the sum of nine thousand two hundred and twenty-five dollars ($9,225.00), less fifteen per cent thereof, or so much as judgment may be rendered for, as compensation to his attorney of record, for prosecuting this case, and in whose favor he asks this court to render judgment in that sum.

SILAS HARE,
Attorney for Claimant.

STATE OF TEXAS, *County of Tarrant, ss:*

Thomas C. Andrews, being duly sworn, deposes and says, I am the claimant in this case. I have read above petition, and the matters

therein stated are true to the best of my knowledge, information, and belief.

THOMAS C. ANDREWS.

Witness—
STUART HARRISON.

Subscribed and sworn to before me this 14th day of June, 1892.
[SEAL.] STUART HARRISON,
A Notary Public in and for Tarrant County, Texas.

2 II. *Defendants' plea.—Filed May 10, 1899.*

Now comes the Assistant Attorney-General, and after leave of the court first had and obtained for plea to the declaration filed herein, says that the claimant ought not to have and maintain his said cause of action, because at the date of the alleged depredation the claimant was wrongfully and unlawfully within the Indian country, and was therefore a trespasser and cannot recover.

HARRY PEYTON,
Actg. Assistant Attorney-General.

3 III. *Findings of fact and conclusion of law.*

This case having been heard by the Court of Claims, the court upon the evidence makes the following

FINDINGS OF FACT.

I.

At the time of the depredation, hereinafter stated, the claimant was a citizen of the United States.

II.

In June, 1877, while the claimant, with a large number of cattle, was travelling over the Chisom trail, the same being an established trail, en route from Texas to a market in Kansas, and while camped on the Washita River, on the Kiowa and Comanche Indian Reservation, in the Indian Territory, Indians belonging to the Kiowa and Comanche tribe of Indians took and drove away property of the kind and character described in the petition, the property of the claimant, which was then and there reasonably worth the sum of $8,300.

Said property was taken as aforesaid, without just cause or provocation on the part of the owner or the agent in charge, and has never been returned or paid for.

III.

At the time of the said depredation the defendant Indians were in amity with the United States.

CONCLUSION OF LAW.

Upon the foregoing findings of fact, as a conclusion of law, that the claimant, Thomas C. Andrews, recover judgment against the United States and the Kiowa and Comanche Indians for the sum of eight thousand three hundred dollars ($8,300.00).

It is ordered that out of the said judgment the sum of one thousand two hundred and forty-five dollars (1,245.00) be allowed and paid to Silas Hare, esq., claimant's attorney of record, in full for services in this case.

BY THE COURT.

4 IV. *Judgment of the court.*

THOMAS C. ANDREWS
vs.
THE UNITED STATES AND THE KIOWA AND COMANCHE tribes or nations of Indians. } Indian depredation No. 7836.

At a Court of Claims held in the city of Washington, on the 14th day of May, A. D. 1900, judgment was ordered to be entered up as follows:

The court, upon due consideration of the premises, find in favor of the claimant, and do order, adjudge, and decree that the said Thomas C. Andrews, claimant, do have and recover of and from the United States and the Kiowa and Comanche tribes or nations of Indians, committing the wrong for which this judgment is rendered, the sum of eight thousand three hundred dollars, of which sum there is allowed Silas Hare, esquire, the claimant's attorney, for prosecuting said claim, the sum of twelve hundred and forty-five dollars, fixed by the court according to the provisions of the act of March 3, 1891, chapter 538, section 9 (1 Supplement of Revised Statutes, 2d edition, pages 915, 916).

BY THE COURT.

5 V. *Application of defendants for and allowance of appeal.*

THOMAS C. ANDREWS
vs.
THE UNITED STATES AND KIOWA AND COMANCHE Indians. } No. 7836, Indian depredation.

Now comes the Assistant Attorney-General and moves for the allowance of an appeal from the judgment of this court in the above-entitled cause, rendered on May 14, 1900, to the Supreme Court of the United States.

JOHN G. THOMPSON,
Asst. Attorney-General.

P. J. FINN,
Asst. Attorney.

Filed June 9, 1900.

At a Court of Claims held June 11, 1900, the foregoing application for appeal was allowed as prayed for.

BY THE COURT.

6 In the Court of Claims.

THOMAS C. ANDREWS *vs.* THE UNITED STATES AND THE KIOWA AND COMANCHE INDIANS.	No. 7836, Indian depredation.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court, and the conclusion of law thereon, of the judgment of the court, of the application for and allowance of appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington, this 18th day of September, A. D. 1900.

[SEAL.]

JOHN RANDOLPH,
Asst. Clerk Court of Claims.

(Indorsement on cover:) File No. 17908. Court of Claims. Term No. 423. The United States and the Kiowa and Comanche Indians, appellants, vs. Thomas C. Andrews. Filed September 20, 1900. Office Supreme Court of U. S. Received Sept. 20, 1900.

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In the Supreme Court of the United States.

THOMAS C. ANDREWS
v.
THE UNITED STATES AND KIOWA and Comanche Indians. } No. 7836.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANTS.

The claimant Andrews brought suit in the Court of Claims under the provisions of the Indian depredation act of March 3, 1891, entitled "An act to provide for the adjudication and payment of certain Indian depredation claims" (26 Stat. L., ch. 538, p. 851), alleging that the Kiowa and Comanche Indians had, in June, 1877, in the Indian Territory, taken from him property of the value of $9,225.

To this claim the defendants plead that, the depredation having been committed on the Kiowa and Comanche Indian Reservation, the claimant was there contrary to the express provisions of the treaty of 1868 with said Indians, and that he was, therefore, a trespasser and could

not recover under the act of March 3, 1891, conferring on the Court of Claims jurisdiction over certain Indian depredation claims arising under the act of April 30, 1834, and subsequent acts.

The act of April 30, 1834, provided—

> That if any Indian or Indians belonging to any tribe in amity with the United States shall, *within the Indian country, take or destroy the property of any person lawfully within such country, or shall pass from the Indian country into any State or Territory* inhabited by citizens of the United States, and there take, steal, or destroy any horse, horses, or other property belonging to any citizen or inhabitant of the United States, such citizen or inhabitant, his representative, attorney, or agent, may make application, etc. * * * *And provided also*, That unless such claim shall be presented within three years after the commission of the injury, the same shall be barred. And if the nation or tribe to which such Indian may belong receive an annuity from the United States, such claim, at the payment of the next annuity, be deducted therefrom and paid to the party injured; and if no annuity is payable to such nation or tribe, then the amount of the claim shall be paid from the Treasury of the United States.

The court below dismissed the defendants' plea and awarded judgment for the claimant, and for a second finding of fact found:

> That in June, 1877, while the claimant, with a large number of cattle, was traveling over the Chisholm trail, the same being an established trail, en route from Texas to a market in Kansas, and while camped on the Washita River, on the Kiowa and Comanche Indian Reservation in the Indian

Territory, Indians belonging to the Kiowa and Comanche tribe of Indians took and drove away property of the kind and character described in the petition, the property of the claimant, which was then and there reasonably worth the sum of $8,300. Said property was taken as aforesaid without just cause or provocation on the part of the owner or agent in charge, and has never been returned or paid for.

The defendants now appeal to this court from said judgment.

CLAIMANT WAS IN FACT A TRESPASSER.

It was incumbent upon the claimant, in order to establish his cause of action, to show by what right or authority he was upon the Indian reservation when he suffered the loss of his property.

This he attempted to do in the court below by alleging:

I. That he was traveling over an established trail; in other words, a right of way by user.

II. A permit from the Secretary of the Interior to certain classes of persons.

III. A special permit of the chief, Bear Shields, of the Cheyenne tribe of Indians; that is to say, he gave 15 head of cattle for the right of passage.

He made no claim of being lawfully on the Indian reservation, otherwise than by virtue of the conditions expressed and implied in these three allegations.

I.

THE PLEA OF USER OR PRESCRIPTION.

As to the right of the claimant or the public to use the "Chislom trail" and pass over or through the Indian reservation, he shows no requisite whatever to the establishment of such right, whether among the Indians, where far greater strictness prevails, or anywhere else.

It appears that the claimant "was traveling the 'western Chisolm trail;' that the trail had been used by citizens of northern Texas to drive their cattle to market in Kansas." All this may be, but it comes far short of establishing a right to drive cattle through or to enter upon the Indian reservation.

The treaty with the Kiowa and Comanche Indians, proclaimed August 25, 1868 (15 Stat. L., p. 581, Art. II), provides:

> The United States agrees that (the*) following district of country, to wit: Commencing at a point where the Washita River crosses the ninety-eighth meridian west from Greenwich; thence up the Washita River, in the middle of the main channel thereof, to a point 30 miles, by river, west of Fort Cobb, as now established; thence due west to the north fork of Red River, provided said line strikes said river east of the one hundredth meridian of west longitude; if not, then only to said meridian line, and thence south, on said meridian line, to the said north fork of Red River; thence down said north fork, in the middle of the main channel thereof, from the point where it may be first intersected by the lines above described, to the main Red River; thence down said river, in the middle

of the main channel thereof, to its intersection with the ninety-eighth meridian of longitude west from Greenwich; thence north, on said meridian line, to the place of beginning, shall be, and the same is hereby, set apart *for the absolute and undisturbed use and occupation* of the tribes herein named, and for such other friendly tribes or individual Indians as, from time to time, they may be willing (with the consent of the United States*) to admit among them; *and the United States now solemnly agrees that no persons except those herein authorized so to do and except such officers, agents, and employees of the Government as may be authorized to enter upon Indian reservation in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article*, or in such territory as may be added to this reservation, for the use of said Indians.

As to user, it is a universal rule of law that in no case can a mere use of a road by the public for any length of time constitute it a public road. (*Gaines* v. *Merryman*, 95 Va., p. 660; *Burlew* v. *Hunter*, 58 N. Y. Supp., p. 453.)

An adverse right to an easement can not grow out of a mere permissive employment. (*Beach* v. *Morgan*, N. H., 41. Atl. Rep., 349.)

But to acquire a public right by prescription, the use by the public must be adverse, continuous, and exclusive. A mere tacit permission or license by the landowner will not suffice. Held, therefore, that the fact that a landowner for a long period of years permitted the residents of a neighboring village, and visitors thereto, to pass through his gate and over his land to an attractive

beach on the seashore created no prescriptive right to a public road through his land. (*Coburn* v. *San Mateo County, Cal.*, 75 Fed. Rep., 520.)

And especially no rights can accrue to the public over wild, uninclosed prairie by mere user (*Angle* v. *Hunt*, Neb., 69 N. W. R., 970), or other vacant land. So that the mere fact that a road has been continuously used for more than twenty years by people having occasion to travel between points reached by it does not show a highway by prescription, where it appears that the road ran through a sparsely inhabited, mountainous region, and had never been laid out and recognized as a highway by the road authorities. (*People, ex rel.*, v. *Osborn*, 32 N. Y. Supp., 358.)

And certainly occasional travel across Government land, which has never been laid out, recorded, or marked as a public road, will not constitute it a highway. (*Sutton* v. *Nicholaison*, 44 Pac. Rep., 805.)

The existence of a highway by prescription is not shown by the evidence of an indefinite and indiscriminate use of a wide extent of open prairie, or by the various wagon tracks thereon, during the prescriptive period. (*Friel* v. *People*, 35 Pac. Rep., 676.)

Where the proprietor of land has a pathway through it for his own use, the mere permissive use of it by other persons, even for half a century, does not confer upon them any right to its enjoyment. So long as its use is merely permissive it confers no right, but the proprietor can prohibit its use, or discontinue it altogether, at his pleasure. To create a presumption of a grant of the right of way, the circumstances attending its use

must be such as to make it appear that it was established for the benefit of the claimant, or that its use was accompanied by a claim of right, or by such acts as manifested an intention to enjoy it without regard to the wishes of the owner of the land. The use must have been enjoyed under such circumstances as will indicate that it has been claimed as a right and has not been regarded by the parties merely as a privilege, revocable at the pleasure of the owner of the soil. (*Hall* v. *McLeod*, 2 Met. Ky., 98.)

To authorize the presumption of a grant, the enjoyment of the easement must not only be uninterrupted for the period of twenty years, but it must be adverse, not by leave or favor, but under a claim or assertion of right; and it must be with the knowledge and acquiescence of the owner. (*Parker* v. *Foote*, 19 Wend., N. Y., 309.)

The public can not gain an easement by prescription in so far as that implies a grant, as the public can not be made a grantee, although the inhabitants of a particular village or locality may acquire a right to an easement, such as a way across a parcel of land, by custom. (Washburn on Real Property, 5th edition, vol. 11, p. 347.)

Parties dealing with Indians must take notice of public treaties and acts of Congress. (*Laughton* v. *Nadeau*, 75 Fed. Rep., 790.)

By Article XII of the treaty of 1868 with the Kiowa and Comanche Indians it is provided that—

> No treaty for the cession of any portion or part of the reservation herein described, which may be held in common, shall be of any validity or force as

> against the said Indians unless executed and signed by at least three-fourths of all the adult male Indians occupying the same.

So that Indians can not grant any interest or easement in lands otherwise than as thus described.

It is, therefore, absurd to claim, as the petitioner in this case actually does, that the doctrine of adverse possession, in regard to a right of way, can have application.

In fact, Article II of the treaty expressly precluded any such claim of right.

II.

THE CLAIM OF AUTHORIZATION BY THE SECRETARY OF THE INTERIOR.

If the contention of the claimant in the court below is correct, it follows that the Secretary of the Interior had the power to annul or modify any express provisions of a treaty made with an Indian tribe. The claimant finds this extraordinary function conferred in part by section 463 of the Revised Statutes of 1834, to wit:

> The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, with and agreeable to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations.

It is not easy to see wherein this act gives the official named any dispensing power over Indian treaties, but the claimant observes that—

> "This law is broad enough to cover all matters growing out of the relations of the Indians with the

> Government and this law, together with the act of May 29, 1872, was authority for the Secretary of the Interior to issue the rules of July 13, 1872."

What was this supplemental statute of May 29, 1872, which clinched the dispensing authority of the Secretary of the Interior? In fact, it was a mere *practice act* and provided—

> That it shall be the duty of the Secretary of the Interior to prepare and cause to be published such rules and regulations as he may deem necessary or proper, prescribing the manner of presenting claims arising under existing laws or treaty stipulations for compensation for depredations committed by the Indians, and the degree and character of the evidence necessary to support such claims; he shall carefully investigate all such claims as may be presented subject to the rules and regulations prepared by him and report to Congress at each session thereof the nature, character, and amount of such claims, whether allowed by him or not, and the evidence upon which his action was based: *Provided*, That no payment on account of said claim shall be made without a specific appropriation therefor by Congress. (17 U. S. Stat. L., sec. 7, p. 190.)

Certainly this language does not indicate that the Indian treaties are subject to the arbitrary rulings of the Secretary of the Interior, and in promulgating his instructions under the above act of Congress of May, 1872, the Secretary of the Interior did not intend to set aside the treaty of 1868 with the Kiowa and Comanche Indians nor any of its provisions, but only to prescribe "*the manner of presenting claims.*" Nor did Congress

intend to confer upon the Secretary of the Interior, or upon any other official, any such autocratic power.

On July 13, 1872, the Secretary of the Interior issued the following "rule" or "regulation:"

> Should the depredation have been committed while the claimant was in the Indian country he must state whether he was lawfully there, either having a license to trade with the Indians, a passport, or a permit from the proper Indian authority, or was en route through said country to a place of ultimate destination to some point within the limits of any State or Territory not included within the limits of the reservation for any nation or tribe of Indians set apart by treaty provision or by Executive order.

It may be well to observe that this claimant has not brought himself within the scope of these express terms, even allowing his own interpretation of the general meaning of the Secretary's rules to be correct.

He does not claim to have had a license to trade with the Indians, or to have had a passport, nor does he show a permit from any Indian authority, nor that he was a mere traveler en route.

But if it is held that the "instructions," or "rules," or "regulations" of the Secretary of the Interior contravene the provisions of the said treaty, the latter must prevail, because not rules and regulations of the Secretary of the Interior merely, but treaties are a part of the law of the land.

And Article II of the said treaty with the Kiowa and Comanche Indians expressly defines the classes of persons allowed within the reservation and prohibits all

others without exception. The language is (Article II, 15 U. S. Stat. L., p. 582), after fixing the bounds of the reservation:

> * * * Shall be and the same is hereby set apart *for the absolute and undisturbed use and occupation of the tribes herein named*, and for such other friendly tribes or individual Indians as, from time to time, they may be willing (with the consent of the United States*) to admit among them; *and the United States now solemnly agrees that no persons except those* herein authorized so to do and except such officers, agents, and employees of the Government as may be authorized to enter upon Indian reservation in discharge of duties enjoined by law *shall ever be permitted to pass over, settle upon, or reside in the territory described in this article*, or in such territory as may be added to this reservation, for the use of said Indians.

By this imperative language the claimant is deprived of all claim that he was lawfully on the reservation, nor do the provisions of the treaty grant to any official of the Government power to admit anyone else than those specified; but it expressly declares that *no other person "shall ever be permitted to* PASS OVER, *settle upon, or reside* in the territory described," etc.

Again, Article I of the treaty, after providing for the punishment of wrongdoers against the whites, provides:

> And the President, on advising with the Commissioner of Indian Affairs, shall prescribe such rules and regulations for ascertaining damages under the provisions of this article as, in his judgment, may be proper; but no such damages shall be adjusted and paid until thoroughly examined and passed upon by the Commissioner of Indian Affairs

and the Secretary of the Interior; *and no one sustaining loss while violating, or because of his violating, the provisions of this treaty or the laws of the United States shall be reimbursed therefor.*

This establishes beyond controversy that the Indians understood and the United States intended that the reservation was "set apart for the absolute and undisturbed use and occupation of the Indians," and any entry upon the same was not only a violation of the treaty, but of the statute.

The Court of Claims held in the *Welch Case* (32 C. Cls. R., 106) that it was unlawful to settle in the Indian country. The claimant in the case at bar had not settled upon the Indian reservation, but was driving a large number of stock from Texas through the reservation to Kansas. But the treaty stipulation places settlers and those en route in the same category, the language being that no person "shall ever be permitted to pass over, settle upon, or reside," so that it is as unlawful to *pass over* as to settle upon the Indian lands or Indian reservation.

But it may be argued by the claimant that he was passing through the reservation in the exercise of a right of transit along and upon an established trail, which other citizens had used. It does not appear by what authority this alleged trail was established. Certainly not by act of Congress, and if this, with other trails, were recognized by the Department of the Interior, it was a recognition against the interests of the Indians and deprived them of rights guaranteed them by the treaty.

If the claimant and others were accustomed to use this alleged trail before the Kiowa and Comanche Indians were transferred by the treaty of 1868, then, upon the ratification of the treaty, all persons were forever prohibited from passing over, settling upon, or residing in the territory set apart by the treaty as a reservation.

Whatever rights the public acquired to pass over this alleged trail prior to the ratification of the treaty and prior to the occupation of the reservation therein described by the Indians were abolished, and if the claimant went upon the reservation with his property he did so at his peril, for he was bound by the express provisions of the treaty.

The treaty upon ratification became the supreme law of the land, and by its terms and provisions must be measured the rights and priviliges of the citizens. Their rights can not be measured by any rule or regulation issued by the Secretary of the Interior or by his Department. The custom of passing over certain trails prior to the execution of the treaty, even with the permission of the Deparament of the Interior, can not be held to confer any rights after the treaty had become operative.

Again, the claimant contended in the court below "that being lawfully or unlawfully in the Indian country certainly was a question for the Interior Department, and its decision was final and conclusive upon this court." He also cited a letter written by the Secretary of the Interior in 1874, in which the Secretary stated "as a general proposition it is quite clear that no community, politically or otherwise organized, whether State, Territorial, or Indian tribes, can legally delay or obstruct by

tax or otherwise the free transit, whether of persons or merchandise, to and from market over any part of the territory of the United States."

This construction would make the Court of Claims merely the agent to carry out the line or practice inaugurated by the Secretary of the Interior or by his Department. The court would then be bound by the decisions of the Secretary of the Interior in all questions affecting the construction of a prior statute or treaty. So far as it affects treaty relations, or rights growing out of treaties, it is a declaration that the construction put upon treaties or statutes by the Secretary of the Interior shall be binding upon all courts of the United States.

Such a doctrine can not be maintained.

The construction put upon an act by departmental officers charged with its execution, says Endlich—

> Will, in cases of doubt and ambiguity—*but, it is said, only in such cases*—be adopted by the courts, or, at least, not disregarded by them, except for cogent reasons. As, however, no such usage can alter the law, it can not *in any proper sense, be binding upon the courts*, bound, as they are, to construe all laws coming before them according to their own judicial views. *Nor, on the reenactment of a statute with additions, would the departmental construction of the original act control the construction of the new one*, especially where this would make some part of the addition repugnant to the body of the enactment. * * * (Endlich on Construction of Statutes, secs. 360, 361.)

It was held in the *Graham Case* (110 U. S., 219), where it was said that the statute there under consideration was clear in its meaning:

Such being the case, it matters not what the practice of the Department may have been, or how long continued, for it can only be resorted to in aid of interpretation and it is not allowable to interpret what has no need of interpretation.

Where a law is expressed in plain and unambiguous terms, whether these terms are general or limited, the legislature should be intended to mean what it has plainly expressed. (*Lake County Commissioners* v. *Rollins*, 130 U. S., 662.) Where a statute is clear and free from all ambiguity, the letter of it is not to be disregarded in favor of a mere presumption as to what is the policy of the Government, even though it may be the settled practice of an executive department. (*St. Paul M. & M. R. Co.* v. *Phelps*, 137 U. S., p. 528.)

A regulation of a Department of the Government does not control the construction of an act of Congress when its meaning is plain. (*Robertson* v. *Downing*, 127 U. S., p. 607.)

Where the meaning of a statute appears to be perfectly clear, no practice inconsistent with that meaning can have any effect. (*United States* v. *Alger*, 152 U. S., p. 384.)

In the case of Alger this court cites with approval *Swift & Co.* v. *United States* (105 U. S., p. 691), the *Graham Case*, and *United States* v. *Tanner* (147 U. S., p. 661). The case of the Swift company was an appeal from the Court of Claims. The law required the allowance of certain discounts on revenue stamps where parties furnished their own dies. The Treasury Department, by a general rule and the practice thereunder, made this discount payable in stamps at their face value instead of in money. This rule was followed from 1862 to 1879,

when the action was brought. Here was a uniform action for seventeen years under the construction in question, the general acquiescence of the purchasers, the payment by them of over forty million dollars under that construction, and subsequent revision and reenactment by Congress of the same statute with no change in this provision. This is a stronger case than the present one, and this court reversed the Court of Claims, and judgment was entered for the claimant.

If this decision be followed, the claimant's contention must fail.

The Indian depredation act of March 3, 1891, is strictly jurisdictional. It affords a remedy for all existing claims, but neither defines them nor creates new liabilities against Indians.

The Court of Claims said in the *Welch case* (32 C. Cls. R., 106) that the subject of liability must be measured by the terms of the act of 1834 (4 Stat. L., p. 729, sec. 17). The court further said:

> When that statute said that if Indians of a tribe in amity with the United States "shall, within the Indian country, take or destroy the property of any person lawfully within such country," the injured party (that is, the party "lawfully within such country") shall have against the Indians redress subsequently prescribed, and the United States will "guarantee to the party so injured an eventual indemnification," it necessarily excluded from its benefits such persons as should not be "lawfully within such country." The defining of one class of persons excluded other classes of persons from its intendment. *Expressio unius, exclusio alterius.* The act said in effect to Indians, if you "pass from the

Indian country into any State or Territory inhabited by citizens of the United States, and there take, steal, or destroy," you shall be held liable for your depredation; and if, within the Indian country, you "take or destroy the property of any person lawfully within such country," you shall likewise be held liable. But the statute assured indemnity to white men only in these two classes of cases, viz, *where the Indians were intruders in the white man's country, and where the white man was lawfully within the Indian's country.* * * * What it did do was to create a liability on the part of the Indians and a responsibility on the part of the United States, and at the same time prescribe the limitations within which this liability and responsibility only should arise. * * *

It therefore seems to the court that this statute, which limited the liability which it created to persons who are lawfully within the Indian country, itself defined what was unlawful. * * * The Indians may not have been justified in taking the law into their own hands and driving the settlers off by force or intimidation, but that was a matter between them and the United States. The Cherokee Nation (the Kiowa and Comanche Indians in the case at bar) was not liable to the person who was unlawfully within its territory, and the Government is not responsible to him for the consequences of his unlawful acts.

This court held, in the case of the *Corralitos Co.* v. *United States and Apache Indians*, that:

> The purpose of Congress in enacting the statute of 1891 undoubtedly was to provide thenceforth a judicial tribunal for the hearing of such claims and for their payment in accordance with the judgment of the court. It is true that the language of the

> provision in the act of 1891, which confers jurisdiction upon the Court of Claims, differs somewhat from that used in the various prior statutes, which had guaranteed the eventual indemnification of the claimant by the Government, but such difference is not, in our judgment, at all significant of an intention to enlarge the liability of the Government to a greater extent than had ever before been recognized. (Decided May 28, 1900, 178 U. S.

This court also held in the *Leighton Case* (161 U. S., 291):

> It follows, therefore, that, though under the terms of the second jurisdictional clause the Court of Claims had jurisdiction over this claim, yet the case having been reopened by the claimant, the Court of Claims properly proceeded to inquire into its merits, and correctly found that there was no law or treaty upon which to base a liability of the United States or the Indians.

The rule of law laid down in these cases applies here with peculiar force.

III.

THE ALLEGED PERMIT FROM THE CHEYENNE CHIEF, BEAR SHIELDS.

The claimant affirms that he procured from this Indian chief authority to pass through the reservation.

We have already had occasion to refer to the treaty provision (Art. XII) which forbids any surrender or transfer of any grant or easement without the concurrence of three-fourths of the tribe, and so the individual consent of this one chief availed nothing whatever. The fact that the claimant supposed he had a right to pass

through the reservation, when, in fact, he had no such right, can not help him. Such belief on his part can not change the statute. Assuming that an Indian chief had authority to grant any right of passage, this chief had no such right, as he was not a member of the Kiowa and Comanche Nation.

This court said in *Jones* v. *Meehan* (175 U. S., p. 1):

> A treaty between the United States and an Indian tribe must be construed not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.

The treaty provided that they were to have the absolute and undisturbed use and occupation of their reservation.

The United States solemnly agreed that no person should ever be permitted to pass over, settle upon, or reside in the reservation described in the treaty.

These terms and provisions could not have been misunderstood by the Indians, and they recognized that any trespass upon the reservation was a violation of their treaty rights, and for the violation of which no action could lie against them.

It is therefore respectfully submitted that the Court of Claims erred in awarding judgment in favor of the claimant and that the same should be reversed.

JOHN G. THOMPSON,
Assistant Attorney-General.

P. J. FINN,
Assistant Attorney.

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No. 423.

Brf. of Hare for Appellee.

FILED
OCT 9 1900
JAMES H. McKENNEY

Filed Oct. 9, 1900.

In the

Supreme Court of the United States.

THOMAS C. ANDREWS,
Appellee,

vs.

THE UNITED STATES, and the KIOWA and COMANCHE INDIANS,
Appellants.

No. 42

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLEE.

SILAS HARE,
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SILAS, LAW PRINTER, 425 E STREET, N. W., WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

THOMAS C. ANDREWS,
APPELLEE,
vs.
THE UNITED STATES, AND THE KIOWA AND COMANCHE INDIANS,
APPELLANTS.

No. 7836.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLEE.

In this cause the court below found the following facts.

"In June, 1877, while the claimant with a large number of cattle was traveling over the Chisum Trail, the same being an established trail, enroute from Texas to a market in Kansas, and while camped on the Washita River on the Kiowa and Comanche Reservation in the Indian Territory, Indians belonging to the Kiowa and Comanche Tribes of Indians, took and drove away property of the kind and character described in the petition, the property of claimant, which was then and there of the value of eight thousand three hundred dollars ($8,300.00)." Said property was taken as aforesaid without just cause or provocation on the part of the owner or the agent in charge and has never been returned or paid for.

Conclusion of Law.

Upon the foregoing Findings of Fact the court decides as a conclusion of law that the claimant, Thomas C. Andrews, recover judgment against the United States and the Kiowa and Comanche Indians, for the sum of $8,300.

Appellants ground the Appeal to this Court upon the following propositions.

> "The depredation having been committed on the Kiowa and Comanche Reservation the claimant was there contrary to the expressed provisions of the Treaty of 1868 with said Indians, and was therefore a trespasser and could not recover under the Act of March 3, 1891."

Appellants rest their appeal upon one proposition namely, that the owner of the property being a trespasser in the Indian Territory cannot recover under the Act of March 3, 1891.

Counsel for appellee beg to present several reasons showing why this proposition is unsound. The first of which is:

That there is not only no authority in the Act of March 3, 1891, for making this defense, but that it is specifically prohibited by the terms of said act.

The language of the law is:

> "Said Court of Claims shall have and possess "jurisdiction and authority to inquire into and "finally adjudicate *in the manner provided in this* "*Act* all claims of the following classes."

It seems to follow that the court being authorized to adjudicate these cases in the manner provided in the act, and the act clearly setting forth the grounds upon which the court should inquire into and adjudicate, then if the court should extend inquiry beyond that declared in the

statute, it would to that extent be adjudicating losses in a manner not provided in the law. It is enough to add here, that the owner of the property having the same in the Territory, or being a trespasser is not found among the defenses set out in the statute, and not being so declared in the law the court was prohibited from entertaining it.

II. The Owner of This Property Was Not a Trespasser Under the Treaty.

If being a trespasser could be made a defense, then under the Treaty referred to, and quoted by counsel for appellants, he was not a trespasser.

In Article II, Subdivision 6 of the Treaty of 1868, referred to by appellants, the Indians obligated themselves:

> "That they will not in future object to the construction of railroads, wagon roads, mail stations, or other works of utility, or necessity, which may be ordered, or permitted by the laws of the United States, but should such roads, or other works be constructed on the lands of the Reservation, the Government will pay the Tribe, &c."

In Subdivision 3 of same article the Indians pledged themselves as follows:

> "Will not attack any persons at home, nor traveling, nor molest, or disturb any wagon train, coaches, mules or cattle, belonging to the people of the United States, or to persons friendly therewith."

Then it was agreed that roads may be constructed across the reservation, that they will not molest any mules, or cattle, the property of citizens, anywhere in the United States. If the owner was driving his cattle over a legally established route, trail or road, as the court finds as a

fact, then was he a trespasser, or was the Indians authorized to confiscate his property and convert it to their own use, notwithstanding the obligations of their Treaty? The conclusion is that as such trails or roads might be legally constructed that the facts established under the finding of the court are that the route was so constructed and used for the traveling public.

III. The Owner Was Not a Trespasser Under the Law.

Section 463 Revised Statutes, enacted July, 1832, and still in force, provides as follows :

> "SEC. 463. The Commissioner of Indian Affairs "shall under the direction of the Secretary of the "Interior, and agreeably to such regulations as the "President may prescribe, have the management of "all Indian affairs and of all matters arising out "of Indian relations."

Mere assertion or opinion cannot efface or destroy the strength of the language here employed. The laying out of trails, or routes through the Indian Territory, for the passage of emigrants, their families and property, or the driving of stock to market across the same, of necessity created the most important of all relations between the citizen, the Indians, and the Government; and to manage these relations was by this statute made the duty of the Commissioner of Indian Affairs under the direction of the Secretary of the Interior. This law, however, did not authorize the adjustment of such losses, as the Indians might wrongfully perpetrate on the whites, or the white man upon the Indians. Congress retained this power until the Act of March 3, 1891. On May 29, 1872, however, an Act was passed, Sec. 466, Revised Statutes, extending the power of the Secretary of the Interior and the Commissioner of

Indian Affairs, which authorized those officials to inquire into and report to Congress certain losses sustained by citizens of the United States by the act of the Indians, which act is set out at length on page 10 of appellant's brief, and here referred to.

Counsel for appellants argue: That the Section last above referred to does not indicate that the Indian Treaties are subject to the arbitrary rulings of the Secretary of the Interior, &c., but only prescribes the manner for presenting claims.

There is no contention that this section "authorized the Secretary of the Interior to annul Treaties nor that he intended to set aside the Treaty of 1868." Our contention is that he acted in pursuance of the authority granted him in Section 466, in promulgating the rules published by him under the authority of said section. That all of his official acts under this law were subsequently expressly ratified by Congress and by such authority placed beyond dispute.

Counsel for appellants on page 9 of their brief say that the only duty of the Secretary under this section was to prescribe the manner of presenting claims.

The section itself would seem to be better authority, and I find that it not only authorized the Secretary to prescribe the rules for presenting claims, but also to set forth the degree and character of the evidence to support such claims. To investigate all claims that are presented, and to report to Congress at each session thereafter the nature, character, and amount of such claims, whether allowed by him or not, and *the evidence upon which his action was based*: and this section closes with a prohibition against any payment unless specially appropriated for. It will be observed that this law did not authorize the Secretary of the Interior or those acting under his

authority to do any act further than simply make inquiry investigate, and report to Congress, to take evidence and report that evidence, to give an opinion as to the amount of loss or damage. He could not disturb any citizen or Indian, in person or property, by reason of the authority here conferred. Congress reserved that authority and did not delegate it. Hence it is a mere gratuity for counsel to say that the language of the Act did not indicate that the Indian Treaties are subject to the arbitrary rulings of the Secretary of the Interior. Congress made the Secretary of the Interior the instrument or means of acquiring information and knowledge for its own future action, and it did act as will be shown.

Of course it will be admitted that Congress has the power to repeal, annul or revise existing laws or treaties, and that a law enacted, that is in conflict with a former law, or treaty will operate as annulling or repealing to the extent of such conflict.

If the Secretary of the Interior performed his duty, and it is conclusively presumed he did, then in the cases he investigated and reported, Congress had before it in such reports the opinion of the Secretary in each case of the amount and value of the property lost, and the evidence in support of such opinion.

When the Secretary of the Interior made his reports to Congress, in each case so reported his duties ended, and all future action growing out of these duties of the Secretary of the Interior, that operated directly upon the Indian, or a citizen, was the work of Congress and not the Secretary of the Interior. If the citizen was to be paid for his loss, Congress must provide the means and manner in which it is to be done, and whether the manner or means so provided by Congress was in conflict with former laws, or treaties, is not a subject of debate.

Action of Congress.

The reports of the Secretary of the Interior embodying his action in each case, with the evidence he had taken, whether approved, or disapproved, the amount recommended for payment, with the rules and regulations which he promulgated, all being before Congress, what action did the law making power take in the premises?

The Secretary of the Interior had in various reports investigated some four thousand cases. These losses according to the evidence had occurred in various States and Territories, and a large number of them in the Indian Territory, and on Indian Reservations. In recommending payment the Secretary of the Interior had made no distinction as to place or locality, and where losses had occurred on the Indian Reservations they were approved or disapproved according to the proof precisely the same as losses occurring elsewhere, and these facts were before Congress when that body undertook to adjust and settle these losses for the citizens.

It may not be irrelevant here to say that Congress after several sessions, and after the formation of a Committee on Indian Depredations found it impracticable to properly determine all these losses, and give the necessary attention to other business. The result was the passage of the Act of March 3, 1891, which transferred the determination of these claims to the Court of Claims. When this Act was passed Congress had before it the cases reported by the Secretary of the Interior to the forty-fifth Congress, Ex. Doc. 126 to the forty-ninth Congress, Ex. Doc. 77; to the fiftieth Congress, 1st Session, Ex. Doc. ——, ——, 2nd Session, fiftieth Congress, Ex. Doc. 103, and to the fifty-first Congress, 1st Session, Ex. Doc. 122, accompanied by the evidence taken in each case which was investigated, and to the laws that Congress then enacted

claimants must look for their remedy and the defendants must look for their defense as clearly provided by that act, which is, that the Court of Claims shall inquire into and adjudicate all these claims in the manner provided in the Act, that is,

> "ALL claims for property of the citizens of the "United States taken or destroyed by Indians "* * * in amity with the United States."

At the passage of this act the authority to investigate these claims was vested in the Secretary of the Interior and that there *should* be no conflict or misconception of the cases which the Court of Claims should adjudicate, a second clause was added, namely:

Such jurisdiction shall also extend to all cases which have been examined and allowed by the Interior Department, and also to such cases as were authorized to be examined.

There is no mistaking the power and authority here imposed upon the court, nor the manner of exercising the same, nor the cases that were to be adjudicated. The court was commanded to first adjudicate these cases in the manner provided in the law, and they were to adjudicate and determine all cases where property was taken or destroyed by Indians at any locality in the United States of America. All cases in which no proof had been made and which came within the period of limitation were to be established by proof of facts as named in that law; all defenses that could be made to a recovery when the claimants made out a prima facie case was named in that law, and if a case had been filed in the Interior Department, and had not been proved then the additional proof could be made in the court. If a case had been proved and a sum recommended, then the

claimant was entitled to a judgment without further proof, unless as provided in section 4 of said act the claimant or the United States should elect to reopen the case, and try the same before the court, provided, *that the party electing to reopen the case shall assume the burden of proof.*

Here this last clause is "assume the burden of proof," not the authority of law, but the proof of facts which established the claim, or which defeat the claim as before provided in the act. The intent of Congress as here expressed seems so clear that it is not perceived how it can be mistaken. For, if the law placed all these claims upon an equality and helped the citizens to the extent, of not requiring him to again make proof before the court that he had already made before the Secretary of the Interior, this did not change the right to recover; all claims, whether presented to the Secretary of the Interior or not, were on exact equality. Now, if Congress when it enacted this law, had before it hundreds of cases where the losses occurred in the Indian Territory and on Indian Reservations and which had been recommended for payment by the Secretary of the Interior, and failed to make the facts of loss occurring in the Indian Territory, a defence, how could the Court of Claims allow the case to be opened to determine a question of law? How could the Court of Claims allow a defence not mentioned in the law, and especially over that clause which is surely mandatory, namely, *to inquire into and finally adjudicate in the manner provided in this act*, so that it is not perceived how counsel can invoke a defence not only unknown to the law, but clearly prohibited by the law.

While I do not deem it necessary, yet it may not be amiss to refer the court to the letter of the Secretary of the Interior of date April 17, 1878, and which refers to and copies a former letter dated in 1874, published in Sen-

ate Documents, Nos. 86 to 100, 2d Session, Forty-fifth Congress, 1877-1878, and which contains Ex. Doc. No. 74, and in which the Secretary of the Interior says, in his report to the Senate:

> "As a general proposition, it is quite clear that no community, politically or otherwise organized, whether State, Territorial, or Indian Tribes, can legally delay or obstruct by tax or otherwise the free transit, whether of persons or merchandise, to and from market over any part of the territory of the United States." (See Report, Sept. 16, 1874.)

The court is also referred to the official map of the Commissioner of Indian Affairs showing the different trails and roads laid out through the Indian Territory, and showing that the trail on which these cattle were taken was one of them, and the authority to pass over these routes of all persons, with their property, &c.

Conclusion.

The foregoing presentation shows that the Court of Claims was limited in its inquiry to the terms of the Act of 1891. That by the Statutes referred to, certain authority was conferred upon the Secretary of the Interior, in which that official was authorized to measure the relations which should exist between the Government, the Indian, and the citizen. That that authority was extended to an inquiry of damage or loss. That the Secretary of the Interior did find for losses. That Congress in the Act of 1891, approved his acts. That these losses occurring in the Indian Territory were referred to the Court of Claims, and that court in obedience to the law, has rendered a great number of judgments, where the loss occurred in the Territory, and especially on the Kiowa and Comanche Reservation and the Osage Indian Reservation, and Con-

gress has appropriated for their payment and they have been paid. Now did not Congress in making that appropriation by a solemn enactment affirm the judgment of the court, and if the case now before the court has equal merits as those determined, how could the court make a distinction that the law-making power thus said shall not be made, therefore, when the Court of Claims found that this claimant was on an established trail, in the Indian Territory, enroute to market from Texas to Kansas, was not that court authorized, and in fact was it not required, as a conclusion of law, (the facts all being established,) to render the judgment which was rendered. It is therefore respectfully submitted that the judgment rendered in favor of the claimant should be affirmed.

SILAS HARE,
Attorney for the Claimant.

Supreme Court of the United States.

No. 423.—October Term, 1900.

The United States and the Kiowa and Comanche Indians, Appellants, *vs.* Thomas C. Andrews. } Appeal from the Court of Claims.

[November 5, 1900.]

Mr. Justice Peckham delivered the opinion of the Court.

The claimant, Thomas C. Andrews, filed his claim in the Court of Claims against the United States and the above-named Indians to recover the value of certain cattle destroyed by the latter in June, 1877, in the Indian Territory. The claim was filed pursuant to the provisions of the act of Congress of March 3, 1891, entitled "An act to provide for the adjudication and payment of claims arising from Indian depredations." (26 Stat. 851.) The property was alleged to have been of the value of $9,225.

The only defense set up was that the claimant at the date of the alleged depredation was wrongfully and unlawfully within the Indian country and was a trespasser, and therefore could not recover.

After a trial, judgment was given against the United States and the Indians for the sum of $8,300, and the court made the following finding:

"In June, 1877, while the claimant, with a large number of cattle, was travelling over the Chisom trail, the same being an established trail, en route from Texas to a market in Kansas, and while camped on the Washita River, on the Kiowa and Comanche Indian reservation, in the Indian Territory, Indians belonging to the Kiowa and Comanche tribe of Indians took and drove away property of the kind and character described in the petition, the property of the claimant, which was then and there reasonably worth the sum of $8,300.

"Said property was taken as aforesaid, without just cause or provocation on the part of the owner or the agent in charge, and has never been returned or paid for."

The Government contends that the claimant was a trespasser by reason of the provisions of the treaty between the United States and these Indians, proclaimed August 25, 1868, (15 Stat. 581,) and because by section 17 of the act of 1834, (4 Stat. 729,) it is provided that the liability of the Government for property taken by Indians, in the Indian Territory, shall arise only when the owner of the property taken was *lawfully* within such territory.

The second article of the treaty, after describing certain lands in the Indian Territory thereby set apart for the absolute and undisturbed use and occupation of the tribes named, provides as follows:

"And the United States now solemnly agrees that no persons except those herein authorized so to do, and except such officers, agents, and employees of the Government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon or reside in the territory described in this article, or in such territory as may be added to this reservation, for the use of said Indians."

By the eleventh article it is, among other things, provided that—

"In consideration of the advantages and benefits conferred by this treaty and the many pledges of friendship by the United States, the tribes who are parties to this agreement . . . further expressly agree—

"3d. That they will not attack any persons at home, nor travelling, nor molest any wagon trains, coaches, mules, or cattle belonging to the people of the United States, or to persons friendly therewith.

* * * * * *

"6th. They withdraw all pretence of opposition to the construction of the railroad now being built along the Platte River and westward to the Pacific Ocean; and they will not, in future, object to the construction of railroads, wagon roads, mail stations, or other works of utility or necessity which may be ordered or permitted by the laws of the United States. But should such roads or other works be constructed on the lands of their reservation, the government will pay the tribes whatever amount of damage may be assessed by three disinterested commissioners, to be appointed by the President for that purpose; one of said commissioners to be a chief or headman of the tribes."

The question now before us is, whether upon the facts found by the Court of Claims the claimant was lawfully within the territory at the time the Indians destroyed or took away his property.

While the Government, by the second article of the treaty of 1868, agreed that no one should be permitted to pass over, settle upon or reside in the territory described in that article, yet in the subsequent article (XI) exceptions were made. By the third and sixth subdivisions of that article the Indian tribes agreed not to attack persons or cattle, and not to oppose the construction of roads or other works of utility or necessity which might be permitted by the laws of the United States. When they took the property of the claimant, consisting of cattle, they violated their agreement.

The finding of the court below, that the property of the claimant was taken and carried away while he was travelling in the Indian reservation, over the Chisom trail, the same being an established trail en route from Texas to a market in Kansas, is equivalent to a finding that the trail was a lawfully established trail permitted by the laws of the United States.

We understand that by the use in the finding of the word "trail," in connection with the balance of the finding, is meant a way, road or path suitable for the purpose of driving cattle over or along on their way to a market. In the territory named, a trail along which to drive cattle from Texas to Kansas would certainly be a work of utility or necessity within the meaning of article eleventh, subdivision six, of the treaty. It would be a road which the Government would naturally seek to provide and obtain permission to lay out or to keep in use for the convenience of its citizens who would have occasion to use it for the purpose indicated in the finding. In order to reverse this judgment we would have to presume that the court in using the words "established trail," meant a trail that was not legally or properly established; this we cannot do, nor can we presume that the trail was established by a user which did not amount to a legal user, and so did not establish a legal trail. Being properly established, it was properly used by the claimant for the purpose stated.

While the finding might have been more definite and therefore more satisfactory, yet within the well-known rules governing the construction of findings of facts by trial courts, we cannot so construe it as to render the result arrived at by the court below erroneous, when another construction much more reasonable and natural may be given it, and the judgment thus rendered valid. An established trail, in this case, means a legally established trail, and we must presume the court below so intended. The claimant was, therefore, lawfully within the territory, and was not a trespasser at the time his property was taken.

Judgment affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.